

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

**DEFFENBAUGH DISPOSAL SERVICES, INC.**

and

**DEBRA MCCORMICK,**  
**A Personal Representative of Jack McCormick**

and

**Cases 17-CA-22625**  
**17-RD-1683**

**GENERAL DRIVERS & HELPERS UNION,**  
**LOCAL NO. 554, affiliated with INTERNATIONAL**  
**BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,**  
**WAREHOUSEMEN & HELPERS OF AMERICA**

*Susan Wade-Wilhoit, Esq.,* Overland Park, KS, for the  
General Counsel.

*J. Randal Coffey, Esq.,* and *Gregory D. Ballew, Esq.,*  
Kansas City, MO, for the Respondent.

*M. W. Weinberg, Esq.,* Omaha, NE, for the Union.

**DECISION**

**Statement of the Case**

**Gregory Z. Meyerson, Administrative Law Judge.** Pursuant to notice, I heard this case in Omaha, Nebraska, on June 3 and 4, 2004. General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union or the Charging Party) filed an original, and an amended unfair labor practice charge in this case on February 19 and April 27, 2004, respectively.<sup>1</sup> Based on that charge as amended, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint on April 29, 2004. The complaint alleges that Deffenbaugh Disposal Services, Inc. (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

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<sup>1</sup> The Respondent's answer denies knowledge of the filing and service of the charges. However, the formal papers received in evidence establish that the charges were properly filed, and were properly served on the Respondent, as alleged in the complaint. G.C. Exh. 1-A & 1-B.

Pursuant to a decertification petition for an election filed by employee Jack McCormick<sup>2</sup> on November 10, 2003, in case 17-RD-1683, and following a Stipulated Election Agreement between the parties, an election by secret ballot was conducted on February 13, 2004. The tally of ballots reflected that there were approximately 126 eligible voters, 40 of whom cast their  
 5 ballots for representation by the incumbent Union and 69 of whom cast their ballots against representation. There were no void ballots and one challenged ballot. Thus, the challenged ballot was not determinative of the results of the election. On February 19, 2004, the Union filed timely objections to conduct affecting the results of the election. Thereafter, on May 5, 2004,  
 10 the Regional Director for Region 17 issued a report on objections and an order consolidating the objections with the complaint allegations for purposes of trial and resolution before an administrative law judge. (G.C. Exh. 1-G.)

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to  
 15 argue orally and file briefs. Based on the record,<sup>3</sup> my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses,<sup>4</sup> I now make the following findings of fact and conclusions of law.

## Findings of Fact

### I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is a  
 25 corporation, with an office and place of business in Omaha, Nebraska (herein called the Respondent's facility), where it has been engaged in the business of refuse and waste disposal services. Further, I find that during the 12-month period ending February 29, 2004, the Respondent, in the course and conduct of its business operations, purchased and received at  
 30 its facility goods and services valued in excess of \$50,000 directly from points located outside the State of Nebraska; and that during the same period, the Respondent sold and shipped from its facility goods and services valued in excess of \$50,000 directly to points located outside the State of Nebraska.

Accordingly, I conclude that the Respondent is now, and at all times material herein has  
 35 been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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<sup>2</sup> Jack McCormick passed away during the time the decertification petition was pending and his wife, Debra McCormick, was substituted as the petitioner and his personal representative.

<sup>3</sup> Counsel for the Respondent filed with the undersigned a Motion to Correct Transcript, which motion was opposed by the Union. I have examined the transcript and concluded that the Respondent's motion has merit. Accordingly, the transcript of this proceeding is hereby  
 40 corrected as reflected in the motion. I would further note that these corrections in the transcript are merely *de minimis*. The Respondent's motion is admitted into evidence as Res. Exh.15, and the Union's opposition is admitted into evidence as C.P. Exh. 3.

<sup>4</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses  
 45 have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

## II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. Alleged Unfair Labor Practices

### A. The Issues

At the commencement of the hearing in this matter, the complaint set forth three separate instances of alleged unfair labor practices. For the most part, these three alleged unfair labor practices encompassed the same matters alleged by the Union to constitute objectionable conduct and enumerated in objections one and two. It was for this reason that the Regional Director consolidated these cases for hearing. However, during the course of the trial, and as a result of certain evidentiary issues that arose, counsel for the General Counsel moved to amend the complaint by withdrawing two of the unfair labor practice allegations. Counsel for the Union objected to this amendment, while counsel for the Respondent, obviously, did not. As it is the General Counsel, not the Charging Party, who controls which matters are alleged in a complaint,<sup>5</sup> I granted the motion to amend the complaint by withdrawal of the two allegations.<sup>6</sup> Further, I advised counsel for the Union that he would have the burden of establishing the alleged objectionable conduct, including those objections no longer encompassed by matters alleged in the complaint, assuming the Charging Party still wished to pursue them.

Following the amendment to the complaint, the only unfair labor practice allegation that remains is paragraph 5(a), the contention that in around late January or early February 2004, translator Victor Gutierrez<sup>7</sup> threatened employees with deportation if they selected the Union as their collective-bargaining representative. The Respondent denies this allegation, and denies that it engaged in any unfair labor practices. (The alleged objectionable conduct will be discussed later in this decision.)

### B. The Facts and Analysis

The Respondent operates a trash disposal company in Omaha, Nebraska and Counsel Bluffs, Iowa. The Union and the Respondent were parties to a collective-bargaining agreement, which was effective by its terms from January 16, 2002 through January 15, 2004. The bargaining unit set forth in that contract was comprised of all residential drivers, residential helpers, and mechanics. (C.P. Exh. 2.)

A number of the employees in the bargaining unit are Hispanic, some of whom speak primarily Spanish. However, the precise number of Hispanic employees is in some dispute.

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<sup>5</sup> See *ATS Acquisition Corp.*, 321 NLRB 712, fn. 3 (1996), citing *Sunland Construction Co.*, 311 NLRB 685 (1993).

<sup>6</sup> Complaint paragraphs 5(b) and (c) have been withdrawn.

<sup>7</sup> In its answer to the complaint, the Respondent admitted the supervisory status of those individuals alleged in the complaint to be supervisors. The Respondent also admitted the agency status of the individuals enumerated in the complaint, but only to the extent that their agency relates to their authorized responsibilities for the Respondent. In any event, I conclude that the evidence establishes that all the individuals alleged in the complaint to be agents were, in fact, acting on behalf of the Respondent, within the scope of their authority, including translator Victor Gutierrez.

One employee witness on behalf of the Union, Leonel Avilez, testified that a “majority” of the employees are Hispanic, while another union witness, Charlotte Hyland, testified that “fifty percent or better” of the employees are Hispanic. However, Hyland was able to identify only 26 of the 128 eligible voters on the Excelsior list<sup>8</sup> as “Latino” or Spanish speaking. (C.P. Exh. 1.)

5 In any event, for purposes of this decision, it is necessary only to recognize that at least a significant number of employees in the bargaining unit are Hispanic, some of whom speak primarily Spanish.

10 The witnesses on behalf of the Respondent testified that, in conducting its election campaign, the Respondent held a total of nine meetings for employees prior to the election. It held three informational meetings each week for the three weeks before the election. Every eligible employee was expected to attend one meeting a week, for a total of three meetings for each employee. Certain of the meetings were conducted in Spanish, while others were conducted in English. Additionally, a number of campaign flyers and pamphlets were distributed  
15 to the employees, in both the English and Spanish languages. For the most part, this testimony was unchallenged.

Doug Sheldrick, the Respondent’s safety director, made the presentations during the English informational meetings. At the Spanish informational meetings, Victor Gutierrez, the  
20 Respondent’s Kansas City safety clerk, was both the presenter and the Spanish language interpreter. Gutierrez is fluent in both Spanish and English. Terry Garretson, the Respondent’s residential operations manager, attended the Spanish information meetings to introduce Gutierrez and then answer any questions that employees might have after the presentation. Garretson does not speak Spanish, therefore, Gutierrez would translate employee questions for  
25 Garretson, and, in turn, translate Garretson’s answers for the employees. For their presentations, Sheldrick and Gutierrez read from prepared scripts, with Gutierrez having translated the English language script into Spanish. At each meeting a video, in either English or Spanish, was shown to the employees, with a different video for each of the three weeks. Each meeting lasted approximately 30 minutes. The videos were about 15 minutes in length,  
30 and the question and answer sessions occurred at the end of each meeting. Again, for the most part, this testimony by company witnesses was not challenged.

As I noted earlier, following counsel for the General Counsel’s withdrawal of several complaint allegations, the only remaining allegation is paragraph 5(a), which alleges that Victor  
35 Gutierrez threatened employees with deportation if they selected the Union as their collective-bargaining representative. It is apparent from counsel for the General Counsel’s post-hearing brief that the only evidence being offered in support of this allegation is the testimony of employee Marcos Natividad. According to Natividad, at one of the campaign meetings held for the Spanish-speaking employees, Gutierrez informed the employees that “if [they] didn’t vote for the Company,” that the Respondent knew some of them were “illegal” and did not have any  
40 “papers,” and that the Respondent could “report [them] to immigration,” which could “deport” them. While Natividad was uncertain at which of the three meetings he attended Gutierrez made this statement, he testified that he was certain the threat was made.

45 Victor Gutierrez denied ever threatening to have employees’ without proper immigration documentation deported because they supported the Union, or words to that effect. Preliminarily, I would note that I was impressed with Gutierrez, and found him to be highly credible. Gutierrez was himself a Mexican immigrant to this country, who was at the time of the

50 <sup>8</sup> This is the list of eligible voters that the Board requires an employer to prepare and provide to the Regional Director within 7 days after the approval of an election agreement.

hearing a recently naturalized United States citizen. He testified that part of his job duties entailed recruiting Mexican workers to enter the United States legally with work visas, in an effort to staff the Respondent's operating needs. He convincingly testified that not only would he never make the statement of which he was accused, but also that if he heard anyone making  
 5 such a statement, he would immediately report them to the Respondent's legal department.

I found Gutierrez to be articulate and intelligent, with a sincere and calm demeanor. After listening to him testify, I seriously doubt that this man, who was himself once an immigrant to this country, would threaten others who were immigrants with deportation. Further, I find it  
 10 highly unlikely that an intelligent and astute individual such as Gutierrez would be foolish enough to make a patently illegal threat at a group meeting to have union supporters deported. Also, Gutierrez' denial is at least partially supported by the testimony of employee witnesses Gonzalo Martinez, Ricardo Mendoza, and Carlos Perez, who while not attending every meeting held for Spanish speakers, testified that they heard no deportation threat from Gutierrez, or any  
 15 other company spokesperson.

On the other hand, I did not find Marcos Natividad to be particularly credible. On cross-examination he admitted, "I don't remember well." He was very nervous when testifying. While this by itself would not be unusual for an employee testifying against his employer's interests,  
 20 and who was not familiar with legal proceedings, his nervousness certainly did not help his memory. He has only two years of formal education, while in Mexico, and admitted that he does not read Spanish very well, which is his native and best language. Of course, a lack of educational opportunity is no reason to find a witness incredible, and I specifically do not do so. However, a lack of education can contribute to an inability to understand a somewhat  
 25 complicated process, such as a labor-management election campaign.

While I do not believe that Natividad was being intentionally untruthful, I am of the opinion that he was badly confused.<sup>9</sup> He claimed to have heard Gutierrez make the threat of deportation, but testified that he never discussed this threat with any of the other employees.  
 30 Practically, it simply makes no sense that had such a threat of deportation been made it would not have been exhaustively discussed among those employees, who like Natividad, were members of an immigrant community where people are generally concerned about such

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<sup>9</sup> Counsel for the Respondent contends that one of the reasons to discredit Natividad is the alleged contradiction between his testimony and a signed statement, which he gave to agents of the Respondent during their investigation of the Union's allegations. (Res. Exh. 1.) The Respondent's agents took a number of such statements from employees, some of which were  
 35 admitted into evidence. However, I have decided not to rely on any of these statements when resolving issues of credibility, or for any substantive purpose. Based on the testimony of Natividad, and other employee witness, I am concerned and disturbed about whether these employees, some of whom did not read or understand English, and had limited education even in their native Spanish language, truly understood what they were signing or who was asking  
 40 them to sign it. I am not convinced that the statements were entirely uncoerced. Further, I am in agreement with counsel for the Union's concern, as expressed in his post-hearing brief, that the *Johnnies Poultry* safeguards may not have been followed. *Johnnies Poultry Co.*, 146 NLRB 770, 774-775 (1964), enforcement denied on other grounds, 344 F.2d 617 (8<sup>th</sup> Cir. 1965). Accordingly, I will give these statements, taken by the Respondent's agents, no weight in  
 45 resolving the issues before me. (It should be noted that the issue of whether the taking of these statements constituted a separate violation of the Act was never raised by the General Counsel, nor litigated before the undersigned.)  
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matters. The fact that no other employees supported Natividad's story, when allegedly there were others present when the threat was made, leads me to further conclude that the statement was never made.

Accordingly, based on the above, I conclude that the General Counsel has failed to met his burden of proof and establish by a preponderance of the evidence that Victor Gutierrez threatened employees with deportation if they supported the Union, as alleged in paragraph 5(a) of the complaint. As this is the only unfair labor practice allegation remaining in the complaint, I shall recommend that the complaint be dismissed. However, I must still consider the Charging Party's objections to the election, including the objection that "supervisors" and "agents" of the Respondent threatened employees with deportation.

#### IV. The Objections to the Election

As set forth in the Regional Director's Order Consolidating Cases and Directing Hearing on Objections to Election, the Union raises two objections to the election held on February 13, 2004 as follows:

1. Supervisors as agents of the Employer and other non-bargaining unit agents of the Employer intimidated Hispanic voters by threats of deportation for voting for the Union in the critical period.

2. Supervisors as agents of the Employer promised increased benefits and wages in the critical period.<sup>10</sup>

Objection number 1, the allegation that Hispanic employees were threatened with deportation for voting for the Union, is in part encompassed by the unfair labor practice allegation concerning the alleged threat by Victor Gutierrez to Marcos Natividad. As indicated above, I have found that allegation to be without merit, and have recommended dismissal of the complaint, which was based upon that allegation. However, during the course of the hearing in this case, the Union raised other incidents, which it alleges support this objection. Therefore, I will deal with each of these additional matters.

Employee Leonel Avilez testified on behalf of the Union. He works as a residential driver, and is bilingual in both English and Spanish. Raphael Lopez works for the Employer as a supervisor.<sup>11</sup> Avilez testified that the first company meeting that he attended prior to the election was conducted in English, while the following two meeting that he attended were conducted in Spanish. On direct examination he testified that at the meeting which he attended two weeks before the election, Raphael Lopez said in Spanish to him and another employee that they were "lucky to have a good place to work," where they "make enough money." Allegedly, Lopez continued with his comments and said that he knew "who had legal papers and who did not." Avilez testified that in his opinion, this was a threat.

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<sup>10</sup> In his post-hearing brief, counsel for the Union makes reference to an alleged withholding of benefits by the Employer. As the Order Consolidating Cases and Directing Hearing On Objections to Election does not contain such an objection, I will not consider it further.

<sup>11</sup> The parties stipulated at the hearing that Raphael Lopez is a supervisor as defined by the Act.

During cross-examination by counsel for the Employer, Avilez changed his testimony and indicated that the conversation with Lopez had occurred at the last company meeting, a few days before the election. Further, he testified that the conversation occurred as the meeting was ending, and he was exiting from the room. According to Avilez, Lopez made his statement about "legal papers" to Avilez and two other employees, while supervisors Garretson and Sheldrick, and translator Gutierrez were present. Avilez testified that he did not discuss Lopez' comment to any other employee prior to the election.

Raphael Lopez testified that he did not attend any of the informational meetings held for employees by the Employer prior to the election. Further, he testified that he was not in the vicinity of those meetings while they were being conducted. He denied ever having a conversation with Leonel Avilez, or any other employee, about knowing which employees had "legal papers," or words to that effect. Specifically, when asked by the Employer's counsel if he recalled ever making a comment to employees about legal papers, deportation, immigration, or the INS (Immigration and Naturalization Service), Lopez responded, "I never have."

I believe Lopez. He was a very credible witness. Lopez, who was born in Mexico, has been a naturalized United States citizen since the mid-1960's. He is a Viet Nam War veteran, who is currently serving as a sergeant in the National Guard. He was articulate, seemed intelligent, and was direct and certain in his answers to questions. While slightly nervous, his demeanor left me with the impression that was a serious individual who understood the significance of the proceedings, and was responding to the questions honestly. As an immigrant himself, I do not believe that Lopez is the type of person who would threaten other immigrants to this country with deportation for not having proper work authorization documents, in an effort to influence their votes.

As to Avilez' testimony, I am highly dubious. His answers were much less definite. On cross-examination, he changed his testimony as to when the conversation with Lopez allegedly occurred. Also, he added details such as the presence of various individuals when the threat was allegedly made. However, the Union offered no witness testimony in support of Avilez, despite his having indicated the presence of several employee witnesses. While he recalled the alleged threat from Lopez, he was much less certain about other matters, frequently responding to questions from counsel for the Employer with the answer, "I don't remember."

Avilez testified that Lopez only commented to him about knowing who had "legal papers" and who did not, on the one occasion. However, I find it incredible that if Lopez were going to make such a threat to Avilez, he would choose a public forum in which to make a transparently unlawful threat.<sup>12</sup> Further, I believe that had such a threat been made, it would likely have been widely discussed among those employees who were immigrants to this country. It is certainly no secret that questions involving immigration, deportation, and work authorization documents are of particular concern to recent immigrants. Avilez' testimony that he did not discuss the alleged threat with other employees leads me to further conclude that the threat was never made.

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<sup>12</sup> Terry Garretson testified that all the Employer's supervisors and managers were required to view the "TIPS video." He indicated that "TIPS" was an acronym for "threats, intimidation, promises, and spying." The video was intended to inform the supervisors and managers, presumably including Lopez, what they could and could not legally say to employees during an election campaign.

In conclusion, I am of the belief that Avilez' testimony regarding the alleged threat by Lopez is inherently improbable, and does not have "the ring of authenticity to it." Therefore, I find that no such statement was ever made by Lopez.

5 However, in support of objection number 1, the Union raises an additional issue regarding the alleged statements of dispatcher Janet Miller. The complaint did not allege Janet Miller as either a supervisor or agent of the Employer, and the parties never stipulated that she served in either capacity. Never the less, at the hearing and in his post-hearing brief, counsel for the Union took the position that she was an agent of the Employer, with the "apparent authority" to act as a conduit for management. Counsel for the Employer argued at the hearing and in his post-hearing brief that Janet Miller was neither a supervisor nor an agent.

15 Although he does not directly concede the point in his brief, it is fairly obvious from the brief that counsel for the Union does not contend that Janet Miller is a supervisor. From the evidence adduced at the hearing, I certainly agree that she is not a supervisor as defined in Section 2(11) of the Act. There was no credible, probative evidence offered to establish that she engaged in any of the indicia of supervisory authority as set forth in the Act.<sup>13</sup> I conclude, therefore, that she is not a supervisor as defined in the Act.

20 Janet Miller served as the Employer's dispatcher. Additionally, she had certain clerical responsibilities concerning the review of work authorization documents. Terry Garretson testified that she assisted in processing applications for employment, and forwarded the applications to the personnel office. A number of witnesses on behalf of the Union testified that Janet Miller reviewed the work authorization documents submitted by applicants for employment, as well as occasionally reviewing the documents of existing employees. However, Garretson credibly testified that Miller merely gathered the appropriate documents submitted in conjunction with the application and forward them to personnel, where the "I-9 form" was prepared.<sup>14</sup>

30 Kim Ellen Miller testified on behalf of the Union. She had been employed by the Employer as a residential driver. She testified that she last worked for the Employer on May 12, 2004, but was "technically" still an employee, having left in connection with an alleged industrial injury and corresponding Worker's Compensation claim. However, according to Terry Garretson, she was terminated by the Employer in May as a "no call, no show" employee. In any event, Kim Ellen Miller (Kim Miller) testified about several conversations that she allegedly had with Janet Miller (Janet Miller) while both were still working for the Employer.

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40 <sup>13</sup> The burden of proving that an individual is a supervisor is on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001). However, it appears that no party is actually taking the position that Miller is a supervisor. Not even the Union, as counsel, referring to Miller, stated at the hearing, "I'm not claiming that she's a supervisor per se. I've never made that claim."

45 <sup>14</sup> The undersigned takes administrative notice that under the Immigration Reform and Control Act of 1986 (IRCA), an employer, by reviewing documentation, must verify the identity, and employment eligibility status, of any person hired by that employer. IRCA sets forth on the I-9 form the types of documents that an employer may accept for verification purposes, and the employer is required to record on the form the issuing authority and expiration date for the documents produced. Under IRCA, there are civil and criminal penalties for an employer who knowingly hires an "illegal alien."

According to Kim Miller, she had a conversation with Janet Miller at the dispatch window about four weeks before the election, during which Janet Miller allegedly said, "If the Mexicans decided to vote to keep the Union in, [I will] be making a phone call to have them deported, because they were illegal." Allegedly, one week later Kim Miller had a second conversation with Janet Miller, who at the time was "going through some papers that had picture ID's and such on them." Kim Miller testified that Janet Miller told her, "These individuals were illegal, their names didn't match other ID," and further that, "if they did try to vote for the Union to keep them in, that phone calls would be made and they would no longer be employed there." Apparently, only the two women were present during these conversations. Kim Miller testified that she never told other employees about these conversations, and never heard Janet Miller make similar statements to other employees.

Another employee to testify about a conversation with Janet Miller was Charlotte Hyland. She was employed by the Employer as a residential driver, and was the union steward at the facility, who also served as the union observer during the election. According to Hyland, Janet Miller is responsible for "checking" the identification of applicants for employment, as well as existing employees. Hyland testified that Miller told her "once" that she was "refusing to give an employee his paycheck... 'till he could prove his proper ID... and that there were several of them like that."

Janet Miller did not testify at the hearing. As noted above, Terry Garretson testified that Janet Miller, who is classified as a dispatcher, does distribute job applications, help applicants fill them out, and receive back the completed applications. According to Garretson, Miller then forwards the completed applications to personnel, reporting to personnel any problems that she observed with the applications. The I-9 form is filled out in the personnel office. Garretson testified that Miller does not determine whether employment documents tendered by job applicants are proper or not.

It is the position of the Employer that Janet Miller is neither a supervisor nor an agent of the Employer, therefore, any statements she may have made to Kim Miller or Charlotte Hyland could not be attributed to the Employer. Further, the Employer argues that even assuming, for the sake of argument, that she was an agent or supervisor, that the statements were not disseminated, and could not have affected the results of the election, which was decided by 29 votes. On the other hand, the Union argues that Miller was an agent of the Employer as she had the "apparent authority" to speak on its behalf, and, thus, her threats to have employees who supported the Union deported must be attributed to the Employer.

The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of an employer when that employee makes a particular statement or takes a particular action. *Cooper industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)* 291 NLRB 82 (1988).

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987) (and cases cited therein). The Board considers the

position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane* 262 NLRB 118, 119 (1982). Further, it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991), *enfd.* 2 F.3d (8<sup>th</sup> Cir. 1993), *cert. denied* 510 U.S. 1092 (1994).

In the matter before me, I do not believe that the Union has met its burden and established that Janet Miller was acting as an agent on behalf of the Employer when she made the statements attributed to her.<sup>15</sup> It is un rebutted that Janet Miller's principal duties are those of a dispatcher. As such, she apparently occupies a position at the dispatch window, where those individuals entering the Employer's facility would have occasion to interact with her. This would include existing employees, as well as those individuals seeking employment with the Employer. She has clearly been designated by the Employer to receive job applications from those individuals seeking employment, probably because of her prominent location at the dispatch window.

As I noted above, the Immigration Reform and Control Act (IRCA) of 1986 requires all employers to verify the identity and employment eligibility status of any person hired, by reviewing certain documents tendered by the job applicant. It is obvious that Janet Miller is responsible for receiving work authorization documents from job applicants at the same time she receives their applications. She is also expected to assist them in filling out the application, and noting for the benefit of the personnel office any problem with their documentation. Miller does not fill out the I-9 form required by IRCA, nor make the decision as to whether an applicant will be hired. Those duties are performed in the personnel office.

The Union offered no probative evidence to establish that employees or job applicants were of the belief that Janet Miller made the decision as to whom should be hired. Leonel Avilez testified on behalf of the Union that he observed Miller checking identification documents for both job applicants and existing employees, and also questioning an employee's identity prior to releasing a payroll check to him.<sup>16</sup> However, this is not the same thing as deciding who is hired and who is not. IRCA requires that where a question arises about an employee's continued work authorization, an employer again review documents to determine that the employee has maintained his authorization to work legally in this country. Further, it is only prudent that an employer verify the identification of individuals seeking payroll checks to ensure that the person who performed the work is the one receiving the check.

I am of the view that these duties performed by Janet Miller are merely ministerial or clerical in nature. They do not involve the exercise of independent judgment, as she does not on her own determine the employment eligibility status of individuals. I see no credible evidence that the Employer has placed Janet Miller in a position such as would create in the minds of employees a reasonable basis for them to believe that the Employer had authorized

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<sup>15</sup> For purposes of this discussion, I will assume that Janet Miller made the statements attributed to her by Kim Miller and Charlotte Hyland.

<sup>16</sup> As I did with Kim Miller and Charlotte Hyland, I will assume, for the sake of argument, that Janet Miller made the statements attributed to her by Leonel Avilez. However, I would simply note that unless Janet Miller is either a supervisor or agent of the Employer, acting within the scope of her authority, that all these alleged statements are inadmissible as hearsay. Only if she is a supervisor or agent would the statements be admissible in evidence as the admissions of a party opponent. See Federal Rules of Evidence, Rule 801(d)(2).

Miller to contact the Bureau of Immigration and Customs Enforcement (BICE),<sup>17</sup> and have union supporters deported. Apparent authority can only result where "...under all the circumstances, the employees would reasonably believe that the employee in question (the alleged agent) was reflecting company policy and speaking and acting for management." *Great American*  
 5 *Products*, 321 NLRB 962, 963 (1993).

As I found above, there is no credible evidence that this Employer, through its admitted supervisor Raphael Lopez, or its admitted agent Victor Gutierrez, threatened to have union supporters deported. The Union claims no other such alleged threats, with the exception of  
 10 Janet Miller's statements. Thus, Miller's statements, assuming she made them, would not support a reasonable inference by employees that Miller was simply reflecting company policy and speaking and acting for management. *Waterbed World, supra*.

It is also significant to note that the employees to whom Janet Miller allegedly made  
 15 these threats about deportation, Kim Miller and Charlotte Hyland, were two Caucasian, English-speaking employees. They were not recent immigrants to this country, and had apparently been employed at the facility long enough to understand the Employer's operation. Surely they understood that the personnel office made the hiring decisions, and that Janet Miller's role in the hiring and payroll process was primarily routine and clerical in nature. It is also significant that  
 20 they did not discuss the alleged threats with any fellow employees, of whom the Hispanic employees might have been especially susceptible to threats of deportation. After viewing their testimony, it is my opinion that Kim Miller and Charlotte Hyland were astute enough to conclude that Janet Miller was merely inflating her own position when she suggested that she would report for deportation those employees without proper documents who voted for the Union.

The Union has not meet its burden to establish that employees reasonably believed that Janet Miller's alleged statements were reflective of company policy or that she was speaking on behalf of management. The Union has failed to present sufficient probative evidence that Janet Miller was acting with apparent authority on behalf of the Employer when she allegedly made  
 30 the statements in question. See *Pan-Oston Company*, 336 NLRB 305 (2001). Therefore, I find that the evidence of agency status for Janet Miller is insufficient.

In conclusion, I find that the Union has failed to establish that the Employer, through its supervisors or agents, intimidated Hispanic voters by threatening them with deportation if they  
 35 voted for the Union, as alleged in objection number 1. Accordingly, I recommend that objection number 1 be overruled.

Objection number 2, that supervisors and agents of the Employer promised employees increased wages and benefits during the critical period, is based exclusively on the testimony of  
 40 a number of employee witnesses. Other employee witnesses, called to testify by the Employer, plus the testimony of various admitted supervisors and agents, deny that any such statements were made. Therefore, the resolution of these issues rests primarily with a determination of the respective credibility of the various witnesses.

Specifically, the Union called three witnesses to testify that the Employer had made promises during the election campaign of a wage increase if the Union were defeated in the election. These three witnesses were Carlos Gonzales, Marcos Natividad, and Leonel Avilez.

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50 <sup>17</sup> This is the successor agency to the INS.

Carlos Gonzales was employed by the Employer as a helper. He testified on direct examination that at the first campaign meeting held by the Employer that translator Victor Gutierrez, "reading from a script," said that if the Employer won the election that the employees "would get better salaries." Allegedly, Gutierrez said that a salary increase was "a sure thing."

Also, Gonzales testified that at this same meeting Gutierrez indicated that if the Employer won the election that there would be a change in the company policy on accidents occurring on the job. Previously, if there were an accident in a company truck, the employees involved would be required to go home, and thereby lose pay. Allegedly, Gutierrez indicated that under the new policy, following an accident, involved employees would not be required to go home. Further, Gonzales testified that at the second campaign meeting, supervisor Terry Garretson told the employees that if the Employer won the election that "the pay for work load would go up [from \$40] to \$100." Gonzales understood this to mean the pay that employees earn for doing "extra work" on "overtime." Finally, Gonzales testified that at the third and last campaign meeting, Gutierrez repeated that if the Employer won the election that "it was for sure that [employees] were going to get [a] salary increase." While he contradicted himself several times, Gonzales ultimately indicated that Gutierrez never specified the amount of any such wage increase.

Victor Gutierrez and Terry Garretson denied making the statements that Gonzales attributed to them. It was their testimony, as well as that of supervisor Douglas Sheldrick, that the supervisors and managers were all very careful not to make promises to the employees. The supervisors and managers were all aware, after viewing the TIPS video, that it was illegal to make promises of benefit to employees contingent on the Union being decertified, and they repeatedly informed the employees that Federal law precluded them from making any such promises. Further, because the employees were generally displeased with their supervisors' response to them about being unable to make promises, the Employer prepared a written response, which explained the legal prohibition against making such promises. This document was then distributed to the employees. (Res. Exh. 8.)

While I find the supervisors' and translator Gutierrez' denials persuasive, there is a more significant reason to discount Gonzales' testimony. I find Gonzales to be a totally incredible witness, and I shall strike his testimony. On cross-examination it became apparent that Gonzales' testimony was filled with contradictions regarding what was or was not said by various supervisors and agents. However, his testimony took a truly bizarre twist when counsel for the Employer showed Gonzales the four affidavits which bore his name, and which counsel for the General Counsel had provided to counsel for the Employer pursuant to the Jencks rule. (Res. Exh. 3, 4, 5, & 6.) To every ones surprise, including counsel for the General Counsel, from whose file the affidavits had come, Gonzales testified that the affidavits were not signed by him, that he had not seen them before, and that he did not recall talking with an agent of the Board who prepared the affidavits. So surprised was counsel for the General Counsel, that she requested, and was given, an opportunity to consult with her superiors at the Regional Office. Ultimately, counsel for the General Counsel moved to amend the complaint, to withdraw those allegations, paragraphs 5(b) and (c), which had apparently been based in large part on the affidavits that bore Gonzales' name. As I noted earlier, I granted her motion to amend the complaint over counsel for the Union's objection.

Based on what occurred at the hearing, I simply do not know what matters transpired earlier that resulted in the General Counsel apparently being in possession of affidavits, which the witness testified were not his, were not signed by him, and were not taken from him by agents of the Board. It remains a mystery to me, and, of course, it would be improper for me to

speculate.<sup>18</sup> However, I am able to conclude that Gonzales was a very confused witness, who repeatedly contradicted himself. Further, the General Counsel was required under the Jencks rule to produce affidavits of the witness in the possession of the Government for use by counsel for the Respondent in cross-examination. I am of the view that despite her attempt to comply, counsel for the General Counsel was not able to do so, as the witness denied that the affidavits that bore his name were his, that he signed them, or that they were taken from him by agents of the Board. Counsel for the Employer was potentially prejudiced by the Government's inability to comply with the Jencks rule. Therefore, I believe it appropriate under these circumstances to strike the testimony of Carlos Gonzales in its entirety. I hereby do so, and shall give the testimony of Carlos Gonzales no weight what so ever in deciding the issues before me.

Marcos Natividad testified on behalf of the Union. He attended three campaign meetings. According to Natividad, at the first meeting Victor Guterrez read from some papers, but not for the entire meeting. He claims that during the meeting Guterrez told the employees that if they gave the Employer "a chance, by ousting the Union, [they] would have a salary increase." Allegedly, Guterrez specified a wage increase to \$9.50. Natividad testified that at the second campaign meeting Guterrez repeated that if the employees "voted for the Company, [they] would have a salary increase and [they] would have benefits." Finally, Natividad testified that at the third meeting Guterrez, reading from a script, repeated what he had previously said at the early two meetings about employees receiving a salary increase to \$9.50 an hour, if they voted for the Employer. According to Natividad, at the time of the meetings helpers, such as himself, earned \$7.40 an hour.

Victor Gutierrez denied promising employees increased wages or benefits. As noted above, I found his denials persuasive. I do not believe that at an organized campaign meeting for a significant number of employees, he would make a patently unlawful statement about increasing the wages and benefits of employees, contingent upon decertifying the Union. For the reasons that I expressed earlier in this decision when dealing with the alleged deportation threat, I found Gutierrez to be a credible witness. I am convinced that he understood the requirement that he not make such promises to employees, and was, frankly, too savvy to have made such a statement in the presence of a group of employees, some of whom were obviously union supporters. See *Hospital of the Good Samaritan*, 315 NLRB 794, 809-810 (1994) (testimony of union supporter concerning threats by management was not credible where it was unlikely that management would make blatantly unlawful statement in the presence of persons who were union supporters). Further, Gutierrez' denial is supported by the testimony of supervisors Garretson and Sheldrick, as well as by the testimony of employees Gonzalo Martinez, Richardo Mendoza, and Carlos Perez, who all testified that they never heard Gutierrez, or any supervisor, promise increased wages or benefits if the Employer won the election. Finally, the written flyer distributed to employees that explained why the Employer could not make promises during the election campaign further supports Gutierrez' testimony. (Res. Exh. 8.) It would be illogical for him to make public promises to employees, at the same time the employees were being told in writing that no such promises could legally be made.

Regarding the credibility of Marcos Natividad, I earlier expressed my reservations about him in the part of this decision concerning the alleged deportation threat. I continue to believe that Natividad, who had only two years of education and was basically illiterate in both English

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<sup>18</sup> I wish to make it very clear that by my comments, I am in no way suggesting that the Regional Office, counsel for the General Counsel, or any agents of the Board did anything inappropriate or improper in the investigation of this case, at trial, or by having the affidavits in question in the possession of the General Counsel.

and in his native Spanish, had considerable difficulty understanding fairly complex issues such as why an employer could not make promises of benefit during an election campaign. As I noted above, he was very nervous when testifying, was confused, and admitted that, "I don't remember well." In fact, I believe that sums up the testimony of Natividad, who really did not remember well. While I am not willing to conclude that he deliberately lied during the hearing, I am of the belief that he was simply wrong when he testified that Gutierrez made promises of increased wages and benefits.

The third employee to testify about alleged promises of benefit was driver Leonel Avilez.<sup>19</sup> This individual is bilingual. He testified that at the campaign meeting held about two weeks before the election, Victor Gutierrez "guaranteed" that the helpers "will be making \$100" a day, and the drivers "will be making more than that, if the Union was out of there." Allegedly, this statement was made in the presence of supervisor Doug Sheldrick.

As is reflected above, both Gutierrez and Sheldrick deny making any such statements, or hearing them made by other supervisors or managers. I continue to find their denials credible for the reasons expressed at length above. Their denials remain supported by the testimony of supervisor Garretson, employees Martinez, Mendoza, and Perez, by the documentary evidence (Res. Exh. 8.), and by the improbable nature of the allegation that they made patently unlawful statements to employees in the presence of numerous union supporters.

Regarding the credibility of Leonel Avilez, I earlier found him less than fully credible. When dealing with the alleged threat of deportation, I concluded that his testimony was contradictory, and that he frequently responded to questions with the statement, "I don't remember." I continue to find his testimony dubious, and do not believe that he testified credibly concerning Gutierrez' alleged promise of increased wages, contingent on the Union being decertified. His testimony that Gutierrez specified that helpers would receive \$100 a day in wages strains credulity. The image of Gutierrez specifying to a large group of employees the exact amount that helpers would receive following the decertification simply does not have "the ring of authenticity to it."

Based on the above, I conclude that the Union has failed to met its burden and establish that supervisors or agents of the Employer promised employees increased benefits or wages if the Union were decertified, as alleged in objection number 2. Accordingly, I recommend that objection number 2 be overruled.

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<sup>19</sup> During his testimony, Avilez made a brief, rather nebulous reference to an alleged promise by Steve and Chris, last names not mentioned, of a better route for Avilez following the election. While there was a fleeting effort to establish the supervisory status of Steve, counsel for the Union did not pursue the issue. The record contains insufficient credible evidence of supervisory status, and insufficient credible, probative evidence of an unlawful promise of benefit concerning an alleged reference to a better route. As the Union has failed to meet its burden of proof regarding this matter, I will not give it further consideration.

### Recommendation on Objections

In conclusion, I recommend that the Union's objections to the election in Case 17-RD-1683 be overruled in their entirety, that the election results be certified, and that this matter be remanded to the Regional Director for any other appropriate action.<sup>20</sup>

### Conclusions of Law

1. The Respondent, Deffenbaugh Disposal Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the complaint in Case 17-CA-22625.

4. The Union's objections to the election in Case 17-RD-1683 are without merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

### ORDER

1. The Complaint in Case 17-CA-22625 is dismissed.

2. The Union's objections to the election in Case 17-RD-1683 are overruled in their entirety, the election results are to be certified, and this matter is remanded to the Regional Director for any other appropriate action.

Dated at San Francisco, California on July 30, 2004.

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Gregory Z. Meyerson  
Administrative Law Judge

<sup>20</sup> In his post-hearing brief, counsel for the Employer requests that the undersigned order the Union to reimburse the Employer for counsel fees and costs. Counsel argues that this affirmative relief is appropriate as the Union allegedly engaged in a "frivolous" action. See *Tidee Products*, 196 NLRB 158 (1972); *Heck's Inc.*, 215 NLRB 765 (1974). I decline the Employer's request. Both the unfair labor practice and objections cases involved the resolution of credibility issues. Those issues were certainly "debatable," and could not fairly be characterized as frivolous. *Heck's Inc.* Accordingly, an extraordinary remedy would not be appropriate in these cases.

<sup>21</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.